No. 91-581

In the Supreme Court of the United States

OCTOBER TERM, 1991

MONICA GREENE, INDIVIDUALLY AND
AS PERSONAL REPRESENTATIVE
OF THE ESTATE OF SYLVIA S. GREENE, PETITIONER

v.

DAVID GRANT UNITED STATES AIR FORCE
MEDICAL CENTER, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

In this action under the Federal Tort Claims Act, petitioner named a federal military hospital, rather than the United States, as a defendant; failed to serve the complaint on the government until after the FTCA's statute of limitations had expired; and then sought to amend the complaint to substitute the United States as a defendant. The question presented is whether the action may now be pursued against the United States on the theory that the amendment merely corrected a misnomer in the original complaint or related back, pursuant to Fed. R. Civ. P. 15(c), to the date the original complaint was filed.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 14-18) is not reported, but the judgment is noted at 931 F.2d 59 (Table). The orders of the district court (Pet. App. 4-5, 7-8, 10-11) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 1991. A petition for rehearing was denied on May 31, 1991 (Pet. App. 12). On September 3, 1991,

Justice O'Connor granted an extension of time within which to file a petition for a writ of certiorari to and including September 28, 1991 (Pet. App. 19). The petition was filed on September 30, 1991 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In this action under the Federal Tort Claims Act, petitioner alleges that her mother's death was attributable to negligent medical treatment from physicians at the David Grant United States Air Force Medical Center. Petitioner's administrative claim, filed pursuant to 28 U.S.C. 2675(a), was denied on October 14, 1988. Under 28 U.S.C. 2401(b), petitioner had six months from that date (to and including April 14, 1989) to bring an FTCA action against the United States. On April 10, 1989, petitioner filed this action in the district court. The complaint named as defendants "David Grant United States Air Force Medical Center, Dr. Timothy Sorrells, Dr. C.S. Waterman and Does 1-100." The United States was not named as a defendant. Pet. App. 15; Pet. 3.

The statute of limitations expired on April 14, 1989. No notice of the suit was given to the United States or any of its representatives by that date. The United States Attorney first received actual notice of the action on June 21—more than 60 days after the expiration of the statute of limitations. Petitioner did not serve her complaint on the United States Attorney until July 27, 1989. Pet. App. 1, 15.

The government moved to dismiss for lack of subject matter jurisdiction. On November 20, 1989, petitioner filed an amended complaint naming the United States as a defendant. After permitting discovery with respect to the question whether the United States had received any notice of the suit on or before

April 14, 1989, the district court dismissed the action. The court held that because the United States did not receive notice of the suit within the period of limitations prescribed by 28 U.S.C. 2401(b), the amendment substituting the United States did not relate back, pursuant to Fed. R. Civ. P. 15(c), to the date the complaint was filed. Pet. App. 4-5, 16-17.

2. The Ninth Circuit affirmed with an unpublished opinion. Pet. App. 14-18. The court first rejected petitioner's contention that the suit was initially brought against the United States—and that the original complaint's identification of the medical center as the non-individual defendant was a misnomer. Relying on allegations of the complaint that referred separately to the medical center, the Air Force, and the United States, the court concluded that "[t]he complaint can only be fairly read as being directed to an agency of the United States and not to the United States itself." *Id.* at 16. The court also held that the amended complaint did not relate back to the filing of the original complaint. "Only if the United States Attorney and the Attorney General receive notice of the suit prior to the running of the statute of limitations," the court explained, "will a plaintiff be allowed to substitute the United States as a defendant under Rule 15(c)." *Id.* at 17 (quoting *Allen* v. *Veterans Administration*, 749 F.2d 1386, 1390 (9th Cir. 1984)). Finally, the court of appeals held that petitioner could not obtain relief from the judgment under Fed. R. Civ. P. 60(b), since "mistake, inadvertence, or excusable neglect does not include failure to sue the proper defendant within the period prescribed by the statute of limitations." Pet. App. 17 (quoting *Allen* v. *Veterans Administration*, 749 F.2d at 1390).

ARGUMENT

1. Petitioner contends that her action was originally brought against the United States and, accordingly, that the subsequent amendment should be regarded only as correcting a misnomer, rather than adding the United States as a new party. Pet. 5-10.

As the court of appeals recognized, the language of petitioner's original complaint forecloses that contention. The complaint named "David Grant United States Air Force Medical Center, Dr. Timothy Sorrells, Dr. C.S. Waterman and Does 1-100" as the defendants. Pet. App. 15. The remainder of the complaint confirmed that the reference to the medical center was not a misnomer—*i.e.*, a failure to use the correct name for a party from which the complaint actually sought relief. The jurisdictional allegation of the complaint stated that the suit was "brought against an agency and employees of the United States." Pet. App. 16. The complaint also distinguished expressly between the United States, the Air Force, and the medical center, and named only the last entity as the defendant. Petitioner's pleading described the Air Force as an "agency of the United States" and the medical center as the place where the individual defendants were employed and petitioner's mother allegedly received negligent medical treatment. *Ibid.* The Ninth Circuit was entirely justified in concluding that petitioner's "complaint can only be fairly read as being directed to an agency of the United States and not to the United States itself. Therefore, the focus of the pleading clearly indicates that the complaint was directed at an agency of the United States and two employees of that agency. * * * The United States itself was not a named defendant."

Ibid.[1] In any event, the interpretation of the allegations of a particular complaint presents no question calling for this Court's review.

Contrary to petitioner's contention, the fact that the summons was addressed to the "UNITED STATES GOVERNMENT" (Pet. App. 2) does not suggest that the action was actually brought against the United States. The complaint is the document in which a plaintiff identifies the parties from whom relief is sought and the basis for those claims. Cf. Fed. R. Civ. P. 10(a) (caption of the complaint "shall include the names of all the parties"). In any event, the caption of the summons, like the complaint, identified the non-individual party as "DAVID GRANT UNITED STATES AIR FORCE MEDICAL CENTER." A court seeking to ascertain the identity of the parties in an action may not properly elevate the description of the addressee of a summons above the summons' caption and the allegations of the accompanying complaint.

The court of appeals' unpublished decision is not in conflict with decisions of other courts of appeals. See Pet. 10-12. In *Datskow* v. *Teledyne, Inc., Continental Products Div.*, 899 F.2d 1298, 1301-1302 (2d Cir.), cert. denied, 111 S. Ct. 149 (1990), and *Dandrea* v.

[1] An action against a federal agency is not the equivalent of an action against the United States. In fact, 28 U.S.C. 2679(a) recognizes the significance of the distinction, and suits brought against federal agencies or installations *eo nomine*, rather than against the United States, are routinely dismissed. See, *e.g.*, *Allen* v. *Veterans Administration*, 749 F.2d at 1388; *Stewart* v. *United States*, 655 F.2d 741, 742 (7th Cir. 1981); *Myers & Myers, Inc.* v. *United States Postal Service*, 527 F.2d 1252, 1256 (2d Cir. 1975); *Morano* v. *United States Naval Hospital*, 437 F.2d 1009, 1010 (3d Cir. 1971); *Holmes* v. *Eddy*, 341 F.2d 477, 480 (4th Cir.), cert. denied, 382 U.S. 892 (1965).

Malsbary Mfg. Co., 839 F.2d 163, 166-168 (3d Cir. 1988), the courts held that complaints using the wrong name for corporate defendants nevertheless manifested a clear intention to sue those corporations. In this case, by contrast, petitioner's complaint distinguished between the United States and the medical center and asserted claims only against the latter. *Peterson* v. *Sealed Air Corp.*, 902 F.2d 1232, 1236-1237 (7th Cir. 1990), is also inapposite. In that case, the court held that a parent corporation received actual notice of a complaint, which incorrectly named a subsidiary as the defendant, when the complaint was served on the parent's registered agent. Here, no representative of the United States received notice of the action until after the statute of limitations had expired.

2. Because petitioner's original complaint did not name the United States as a defendant, her amendment adding it as a party was governed by the second sentence of Fed. R. Civ. P. 15(c).[2] In *Schiavone* v.

[2] Until December 1, 1991, Rule 15(c) provides:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party to be brought in by amendment that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.
>
> The delivery or mailing of process to the United States Attorney, or the United States Attorney's designee, or the

Fortune, 477 U.S. 21, 29-32 (1986), this Court held that Fed. R. Civ. P. 15(c) provides for relation back of an amendment substituting a defendant only if that defendant receives notice of the action within the period of limitations. The district court determined, after discovery, that no representative of the United States received notice of petitioner's action within the period of limitations. Consequently, as petitioner acknowledges (Pet. 5, 10-12), *Schiavone* compels the conclusion that her amendment does not relate back under Rule 15(c).

There is no sound reason why the Court should reconsider its decision in *Schiavone*. The decision in that case was based on Rule 15(c)'s plain language, 477 U.S. at 30, and there has been no intervening development casting doubt on the Court's reasoning. In fact, this Court has promulgated an amendment to Rule 15(c), addressing cases like this one, that will become effective, in the absence of congressional action, on December 1, 1991. Under the proposed rule, an amendment to a complaint substituting the United States as the defendant in an action will relate back if service is made on a United States Attorney within the period permitted by Rule 4(j).[3] Unless Congress acts to block the amendment (and that appears unlikely to occur), the correctness of the Court's

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Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

[3] The amendment to Rule 15(c) refers to Rule 4(m). However, the amended rules will contain no Rule 4(m); Rule 4(j) seems clearly to be the rule to which Rule 15(c) was intended to refer.

interpretation of the present version of the rule will have little continuing significance.[4]

3. The court of appeals correctly rejected petitioner's contention that Fed. R. Civ. P. 60(b) authorizes relief from a statute of limitations that, in this instance, is a limit on a waiver of sovereign immunity.[5] In any event, a decision to deny relief under Rule 60(b) is subject to review only for abuse of discretion. See, *e.g.*, *Toth* v. *Trans World Airlines, Inc.*, 862 F.2d 1381, 1387 (9th Cir. 1988). The court of appeals was fully justified in concluding that "the district court did not abuse its discretion in denying relief from judgment under Rule 60(b), as mistake, inadvertence, or excusable neglect does not include

[4] The order promulgating the 1991 amendments provides that they "shall govern all proceedings in civil actions thereafter commenced and, insofar as just and practicable, all proceedings in civil actions then pending." 111 S. Ct. CCXIII (1991). It would not be "just and practicable" to apply the amendment to Rule 15(c) so as to resurrect actions that, under the statutes and rules previously in effect, were outside the period of limitations.

[5] The issue of equitable tolling was not raised in the lower courts. Cf. *Irwin* v. *Veterans Administration*, 111 S. Ct. 453 (1990). However, this is not a case in which that doctrine could properly be invoked. Here, Rule 15(c) specifies the circumstances under which a defendant not named within the period of limitations may be brought into an action; the doctrine of equitable tolling may not be employed to circumvent those limitations. In any event, the error involved in this case—the failure to name the correct defendant in an FTCA suit—gives rise at best to "a garden variety claim of excusable neglect" that is insufficient to warrant equitable tolling. 111 S. Ct. at 458. This Court made clear in *Irwin* that "[b]ecause the time limits imposed by Congress in a suit against the Government involve a waiver of sovereign immunity, * * * no more favorable tolling doctrine may be employed against the Government than is employed in suits between private litigants." *Ibid.*

failure to sue the proper defendant within the period prescribed by the statute of limitations." Pet. App. 17 (quoting *Allen* v. *Veterans Administration*, 749 F.2d at 1390).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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